



II. Duties to Prospective Clients

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Duties to Prospective Clients

- ▶ When thinking about ethical issues for lawyers, it is always worthwhile to start by reviewing the relevant sections of the rules of professional conduct for the state or states where the lawyer is licensed to practice.
- ▶ In terms of duties to prospective clients for lawyers who practice in Indiana, the Indiana Rules of Professional Conduct provide some helpful guidance.
 - Rule 1.18. Duties to Prospective Client

ABA Model Rules of Professional Conduct

- ▶ The ABA Model Rules of Professional Conduct address duties to prospective clients, with substantive information provided in the Comments.
- ▶ Note the references to other Rules, such as Rule 1.1, Rule 1.15 and Rule 1.10.

Bar Association Opinions

- ▶ A number of bar associations have highlighted the ethical issues with prospective clients and provided guidance, including formal ethics opinions and informal advisory notes, on typical situations that the lawyer may face.
- ▶ For example, the Board of Overseers of the Bar in the State of Maine commented on the scenario in your materials:
- ▶ The response was that: No. Under MRPC Rule 1.18 (Duties to Prospective Client), all of the information discussed at the initial intake between PC and Lawyer must remain confidential.

Confusion About the Duty

- ▶ Likewise, Hirschbiel identified confusion over the duty owed to prospective clients as one of the top ten myths about the rules related to handling confidential client information.
- ▶ **Myth #2: You owe no duty of confidentiality to prospective clients.**
- ▶ Oregon RPC 1.18 sets forth a lawyer's duties to prospective clients.

Potential Risks When Declining a to Represent a New Client

- ▶ Eichenhorn identifies the following risks posed by prospective clients, with suggestions for how to effectively manage these risks.
 - Allegations of neglect or delay or negligence advice (including her recommendation to document that the representation was declined by using non-engagement letters)
 - Breaches of confidentiality or conflicts of interest (limit information received, protection the confidentiality of the information that was received and record the contact with the prospective client in the conflicts database)
- ▶ She also provides a checklist for a non-engagement letter and sample language.

Burden is On the Attorney

- ▶ Even before the advent of the Internet and other recent communication technologies, the cases make it clear that the burden is on the attorney to clarify the nature and terms of the legal representation.
- ▶ This includes the work that the law firm will do and the amount that will be charged, but also when the attorney-client relationship begins and when it ends.
- ▶ In cases where the potential client believed that he or she had “hired” the attorney to handle a matter, but the attorney thought otherwise, the court has protected the potential client by finding that an attorney-client relationship did exist.
- ▶ The attorney is under a duty to advise the prospective client of statutes of limitations that may be running and other issues that may impact the person’s ability to safeguard his or her legal interests.

Best Practices

- ▶ Most commentators on legal ethics and best practices for law firms would recommend the use of representation letters and declination letters as well as letters to clients when cases are closed and matters are concluded.
- ▶ The same care should be taken in clarifying the relationship when using the Internet or other communication technologies.
- ▶ For example, The Bar Plan, a legal malpractice insurance provider, has provided a number of good articles about how to avoid inadvertently forming an attorney–client relationship through a law firm’s website,

Best Practices

- ▶ The use of disclaimer is the first line of defense.
- ▶ Such a disclaimer should also appear with any of the attorney biographies and in response to any email messages that might be sent to the law firm.
- ▶ Also, the law firm's website should make it clear that only legal information is being provided, not legal services or legal advice, especially since law firm websites can be viewed by people in other states and countries where the lawyer may not be licensed.

Best Practices

- ▶ Here is an example of language provided at the bottom of a law firm's website:
 - “This site and any information contained herein are intended for informational purposes only and should not be construed as legal advice. Seek competent counsel for advice on any legal matter. Woodard, Emhardt, Moriarty, McNett & Henry LLP cannot guarantee that the content of this website is complete or up to date.”
(<http://www.uspatent.com/>, accessed 10/29/15)
- ▶ Disclaimers at the end of email messages should also be used – see the example from Redding Law, LLC in your materials.

Best Practices

- ▶ The Bar Plan's publication, *The Advocate*, contains the following suggestions for what should be covered in a disclaimer: "1) No attorney–client relationship is created by the receipt by the lawyer of the potential client's information, and 2) No privilege or confidentiality attaches to the information."
- ▶ This second provision speaks to the attorney's duty to prospective clients under the Rules of Professional Conduct and also helps to avoid a conflict of interest because of information that might be shared by the prospective client.
- ▶ See also the articles by Eileen Libby and from *Wisconsin Lawyer*.

Application for Malpractice Insurance: Concerns About Prospective Clients

- ▶ 16. Are Engagement letters or fee agreements utilized?
- ▶ 17. Are Declination (Non-Engagement) letters utilized?
- ▶ 18. Are termination or closing letters utilized?
- ▶ 22. Does your law firm have a website?
- ▶ a. If yes, does the website contain a disclaimer to the effect that use of the website does not create an attorney-client relationship?
- ▶ 23. Does the law firm respond to solicitations for legal advice over the Internet?
- ▶ a. If yes, is a conflicts check conducted prior to providing the legal advice?
- ▶ 26. Other than your own website, do you advertise on the Internet? If yes, provide web addresses.

Law Firm Websites

- ▶ In addition to the importance of using disclaimers, other aspects of law firm websites were identified by The Bar Plan as perhaps having ethical implications as well.
 - Does the website list additional attorneys who are not listed on the application (for malpractice insurance)?
 - Does the website list affiliations with other law firms?
 - Do the areas of practice set out in the website coincide with the application (for malpractice insurance) or does the firm list additional areas of practice on its website?

Law Firm Websites, cont.

- Does the overview of the firm, as stated on the website, coincide with the firm's application (for malpractice insurance)?
- Does the website show lawyers licensed in states not listed in the application (for malpractice insurance), and the firm have offices in those states?
- Does the website carry additional information, such as news and media coverage about the law firm, past settlements and verdicts obtained, additional legal resources or an FAQ's section (which could be construed as legal advice), links to other websites, or statements about the firm's approach to client relationships?

Indiana Rules of Professional Conduct

- ▶ Rules 7.1–7.5 about what kind of information is permissible on law firm websites and what is prohibited.
- ▶ However, note that a proposed revision of Rule 7.1 may permit more leeway in what information can be provided, eliminating the long list of prohibited statements in subsection 2 of the Rule and instead attempting to clarify when otherwise truthful statements would be considered misleading.
- ▶ Also, Ellis (*WordPress in One Hour for Lawyers*) makes it very clear that websites are considered law firm marketing/advertising.

From *WordPress in One Hour for Lawyers*

- ▶ “There is no doubt that websites are marketing. Therefore, you must follow the ABA’s Model Rules pertaining to marketing and advertising and/or the rules adopted in your jurisdiction.... Please check your own jurisdiction’s rules, and keep in mind that a firm must follow all rules for all of the jurisdictions in which any of its lawyers are licensed.”

From *WordPress in One Hour for Lawyers* – Ethical Issues with Websites

- ▶ Honesty
- ▶ Expectations
- ▶ Domain names
- ▶ Office names
- ▶ Specialist and expert designations (see Indiana Rules of Professional Conduct)
- ▶ Comments, communication and the unauthorized practice of law (beware of forming a lawyer–client relationship by answering legal questions in too specific a manner. *Id.* at 117)
- ▶ Disclaimer – with suggested language (*Id.* at 118–119)
- ▶ Blogs
- ▶ Backing up the site and keeping copies
- ▶ Security, especially given concerns about hackers
- ▶ Keeping the website current
- ▶ Choosing safe plugins
- ▶ Using a scanner to check for malware

Social Media, etc.

- ▶ Attorneys should take special care in all of their communications with potential clients, especially potential clients that they might be interacting with through social media, email or other Internet-based technologies.
- ▶ There are special ethical rules related to the marketing and advertising of legal services.
- ▶ Indiana has updated its Rules of Professional Conduct to reflect the new ways of communication available to attorneys who want to delve beyond the traditional paper- and mail-based methods of reaching prospective clients
- ▶ There are proposals to do so again [as presented at the ISBA House of Delegates meeting in October 2015, *see* proposed revisions to Rule 7.1 and Rule 7.2].

Social Media, etc.

- ▶ In terms of social media, a lawyer also has to be mindful of the issues of “friending” people or assuming a different persona or identity in a manner designed to glean information or an unfair advantage (*See* Section IV. Case Delays and Insufficient Client Communications).
- ▶ A number of Rules of Professional Conduct could be violated by inappropriate use of social media, including
 - Rule 4.1 Truthfulness in Statements to Others
 - Rule 4.2 Communications with Persons Represented by Counsel
 - Rule 4.3 Dealing with Unrepresented Persons
 - Rule 4.4 Respect for the Rights of Third Persons, to name but a few.

Article on social media by Gubbins from the *Michigan Bar Journal*

- ▶ Write only the truth.
- ▶ Don't mention clients or their matters without their consent.
- ▶ Avoid answering legal questions. As the author notes, "[a]nswering legal questions on social media sites can be dangerous. Individuals asking legal questions may interpret your responses as legal advice from you, their 'new lawyer,' whereas you don't view them as clients." The author goes on to caution: "Be aware that an initial consultation may result in the formation of a client-lawyer relationship even if you decline to undertake the representation." Also, even if this does not create a client-lawyer relationship, "confidences imparted in good faith cannot be used to the disadvantage of the prospective client, as provided by MRPC 1.7(b) and 1.9."
- ▶ Keep sites up to date.
- ▶ Be aware of what others say on your site.
- ▶ Keep detailed records of what you post online.

Gubbins, cont.

- ▶ The author concludes by observing that “[s]ocial networking sites can help you better serve your clients and bring in new business at a relatively low cost. But remember your ethical obligations when using these sites to protect yourself and your clients.” (*Id.* at 25)

From Policies on Posting – *The Indiana Lawyer*

- ▶ “Use of social media, blogging, and creating an Internet presence can be a key asset and source of marketing and client outreach for attorneys. But it can also be perilous when a comment brushes against the Rules of Professional Conduct.”
- ▶ Chief Justice Loretta Rush indicates that more lawyer disciplinary cases arising from social media are coming before the Indiana Supreme Court. These cases often involve disclosure of confidential client information or questionable online comments directed at opposing counsel or parties.
- ▶ Many of these cases are handled with a private caution, but social media “has gotten a lot of attorneys in trouble.”
- ▶ In the survey, 46 percent of attorneys indicated that their law firms had no social media policy, compared with 37 percent of said their firm had such as policy in place.

Law Firm Examples

- ▶ The firm has no social media policy, but uses a Twitter account to share announcements.
- ▶ Its lawyers are encouraged to post appropriate content on personal accounts.
- ▶ Nothing is posted that could be considered legal advice.
- ▶ Content is focused on current events and trends related to practice areas, court decisions and promoting events involving the lawyer or his firm.
- ▶ Another law firm screens posts before they appear on the law firm's social media accounts.
- ▶ Another lawyer is careful about what she posts on her private, non-professional Facebook page, because "we never stop being lawyers."
- ▶ Clients should also be cautioned about what to post about pending cases, which can potentially be used as evidence by opposing parties.

Policies on Posting, cont.

- ▶ Even an innocuous post may be cause for concern, depending on an attorney's practice area.
- ▶ The article gives the example of a mergers and acquisitions attorney using a check-in and location websites to share traveling location and duration of stay.
- ▶ Someone who knows the lawyer has a particular client in that location may glean some valuable information.
- ▶ In turn, that could disclose, inadvertently, information about the client and hint at why the lawyer is there.

Other Internet Activities Related to Prospective Clients

- ▶ The same ethical considerations should apply when an attorney publishes a blog or participates in a forum.
- ▶ These ethical considerations should include civility, truthfulness, competence, confidentiality of client information and respect for third parties and the content of the blog should be based on thorough research.
- ▶ Moreover, the blog or forum should make it clear that this is the attorney's opinion only and should not be relied on as legal advice or the provision of legal services.
- ▶ Attorneys should be particularly careful that their participation in blogs, forums, chat rooms and social media sites is not construed as advertising or solicitation in a way that would cause them to run afoul of the Rules of Professional Conduct.

Abiding by Rules 7.1 and 7.2 in a #DigitalWorld– from *The Indiana Lawyer*

▶ Current rules:

- Needs to be marked “Advertising Material”
- Name of firm or at least one lawyer and the street address (no virtual offices allowed yet)
- Obligation of client confidentiality – advice is that if you are using reported cases on your website, you should get the client’s permission
- No testimonials
- Restrictions on when “specialty” can be claimed
- If people are posting endorsements, they must be truthful and not misleading

Abiding by Rules 7.1 and 7.2, cont.

- ▶ The gray areas:
 - Blogs
 - Lawyer listings
 - Social Media
- ▶ Note: There are proposals to revise the Indiana Rules of Professional Conduct again [as presented at the ISBA House of Delegates meeting in October 2015, *see* proposed revisions to Rule 7.1 and Rule 7.2].



Any Questions?

Thank you for attending the seminar today!